

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. § 1324c Proceeding
) CASE NO. 93C00033
OSCAR EDUARDO)
VILLATORO-GUZMAN,)
Respondent.)
_____)

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S
MOTION FOR SUMMARY DECISION AND ORDER DENYING
COMPLAINANT'S ALTERNATE MOTION OF ABANDONMENT

(June 22, 1994)

Appearances:

For the Complainant
Frederick E. Newman, Esquire

For the Respondent
Bradley E. Brook, Esquire

Before:

E. MILTON FROSBURG
Administrative Law Judge

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I. Introduction

On July 22, 1993, I issued an Order Granting Complainant's Motion to Strike Affirmative Defenses wherein I discussed the background and legislative history of 8 U.S.C. § 1324c as well as the legal procedure involved in processing a civil document fraud case under 8 U.S.C. § 1324c. I also set out the procedural history of this case to that date, wherein I had found Respondent's arguments (1) that this court lacked subject matter jurisdiction, (2) that there was a failure to state a claim, (3) that the Complaint was vague, and (4) that Respondent suffered a lack of due process, to all be without merit. Additionally, I held in abeyance ruling on the Complainant's pending Motion for Summary Decision as I wished to discuss the issues with both counsel.

II. Procedural History

I held a prehearing telephonic conference on September 24, 1993, wherein I again deferred ruling on the government's Motion for Summary Decision, after granting, in the interest of justice, Respondent's counsel oral motion for extension of time to file a response to said motion.

As counsel represented that they would not be conducting any additional discovery, I scheduled another prehearing telephonic conference for Friday, October 22, 1993, and reserved November 9-10, 1993 for a possible evidentiary hearing.

On October 12, 1993, Complainant filed the following documents in support of its Motion for Summary Decision: (a) Affidavit by Neil M. Jensen, Senior Border Patrol Agent, INS, dated October 7, 1993; (b) Affidavit of Lawrence E. Harvey, Border Patrol Agent, INS, dated October 7, 1993; and, (c) Affidavit of Frederick E. Newman, Trial Attorney, INS, dated October 8, 1993.

Agent Jensen stated in his Affidavit that, on September 29, 1992, the Santa Barbara police found an alien registration card (INS Form-551) and a Social Security Card, both in Respondent's name, in Respondent's girlfriend's purse. He stated further, that on September 30, 1992, Respondent was arrested and charged with forgery and a vehicle code violation. Then on October 1, 1992, the Santa Barbara Police contacted Agent Jensen and relayed the previous facts, along with the Respondent's alien registration number. A computer check of the INS Central Index System confirmed that no such alien registration number

existed. As such, Agent Jensen interviewed Respondent and determined that he was a deportable alien.

On October 2, 1992, Border Patrol Agent Harvey interviewed Respondent and took Respondent's sworn statement. Harvey stated he conducted Respondent's interview in Spanish, translated Respondent's statement accurately and completely into English, hand printed it and read it back to Respondent in Spanish. However, Respondent refused to sign it. On that same date, Agent Jensen contacted Respondent's employer and obtained Respondent's Employment Eligibility Verification Form (Form I-9), the supporting documents, a copy of the Social Security Card, a copy of the Alien Registration Card, a copy of Respondent's Employee's Claim for Workers' Compensation Benefits, and a copy of Respondent's Employer's Report of Occupational Injury of(sic) Illness (Form 5020).

On October 7, 1992, Respondent was turned over to Border Patrol custody from the Santa Barbara jail, where he was processed, released and personally served with the Notice of Intent to Fine. All the aforementioned documents have been filed with the court.

Frederick E. Newman, Complainant's counsel, stated in his Affidavit that, at his request, the Santa Barbara Police Department had mailed him copies of: (1) the April 11, 1991 Superior Court Order of Probation for Respondent's girlfriend; (2) the October 6, 1992 Declaration in Support of Arrest Warrant regarding Respondent's girlfriend's arrest; and, (3) the October 1, 1992 Arrest Follow-Up Report Exhibit, which detailed the facts surrounding the discovery of Respondent's fraudulent documents. In the last document, Respondent admitted and explained why he had obtained these documents.

On October 25, 1993, I held a Prehearing Telephonic Conference to discuss Complainant's Motion for Summary Decision and Respondent's lack of response. Upon inquiry, Respondent reported that he had understood that his response was not due to be filed until a few days before the November 9, 1993 scheduled hearing.

As this was a case of first impression, in the interest of justice, I allowed Respondent until November 2, 1993, to file his response and Complainant until December 6, 1993 to reply. Additionally, Respondent's counsel indicated that his client would be permanently leaving the United States on or about October 29, 1993, but had supplied counsel with information for the response.

I canceled the previously scheduled November 9-10, 1993 hearing, to be rescheduled at a later time, if necessary.

On November 3, 1993, Respondent filed its Opposition to Complainant's Motion for Summary Judgment. Counsel did not address the facts in this case or file any evidentiary support to dispute Respondent's liability.

Instead, counsel requested: (1) a fine no greater than \$250.00, payable within 90 days, based on the Respondent's departure from the United States and lack of sufficient funds to pay more, (2) an Order to Respondent to cease and desist from any further use of any false and counterfeit documents, and, (3) an Order which would not affect Respondent's right to lawfully enter the United States or to be granted any lawful immigration status.

In support of this request, counsel stated that Respondent's departure from the United States was an effort to reduce the severity of Complainant's relief and would only return to the United States lawfully. Counsel represented that Respondent originally came here to escape political persecution in Guatemala and had made application for political asylum. However, based on Respondent's perception that the political conditions in Guatemala had changed, Respondent felt that he was now able to return. Respondent's counsel argued for "mercy" so that Respondent might be able to lawfully enter, reside, or emigrate to the United States at some future date.

To further support his request, Counsel argued that the court was empowered to make an order to provide such "appropriate relief" as might be necessary and that justice would be best served by including language in my order that would prevent Complainant from barring Respondent's future legal entry or application for citizenship.

On November 12, 1993, Complainant filed a Reply to Respondent's Opposition to Motion for Summary Decision. In its reply, counsel argued that, under 28 C.F.R. § 68.37(b)(2), a party is deemed to have abandoned his hearing request if:

(2) Neither the party nor his or her representative appears at the time and place fixed for the hearing and...

(i) Prior to the time for hearing, such party does not show good cause as to why neither he or she nor his or her representative can appear...

Complainant's counsel argued that Respondent's voluntary absence from the United States by returning to Guatemala four or five days prior to his civil document fraud hearing was not "good cause" for failing to appear for his hearing. Additionally, pursuant to 28 C.F.R. § 68.37(c), a default decision under 28 C.F.R. § 68.9(b) may be entered with prejudice against any party failing, without good cause, to appear at a hearing.

In addition, Complainant's attorney argued that this court may grant summary decision based upon the unopposed pending motion stating that 28 C.F.R. § 68.37(b) provides:

...When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing there is a genuine issue of fact for the hearing.

Complainant stated that Respondent's opposition motion set forth no facts, law, discussion, or argument showing that there were genuine issues of fact for hearing.

Complainant also argued that I had no authority to enter an order controlling Respondent's immigration status or excludability/deportability and that Complainant is entitled to a Final Decision and Order finding Respondent liable for the two civil document fraud violations charged in the Complaint, requiring payment of the \$1,000.00 civil monetary penalties, and an order to cease and desist from further violations of 8 U.S.C. § 1324c.

On January 13, 1994, I set a Prehearing Telephonic Conference for January 18, 1994 to hear Respondent's position on liability, waiving the request for hearing, and any equities that might apply to my determination of the civil money penalties after a finding of liability.

At said conference, counsel stated that, to the best of his knowledge and belief, Respondent had left the United States to mitigate his violation of the statute. He also stated that, on his client's behalf, he was waiving Respondent's request for hearing and that since Respondent did not have a meritorious position with regard to liability, he had not argued that issue in his response to Complainant's Motion for Summary Decision.

Upon my inquiry as to whether or not counsel wished to present any of the Respondent's equities, Respondent's counsel requested a short

additional time in order to consult with co-counsel, who apparently had more experience in these matters, and to submit written argument.

As such, I granted Respondent fifteen (15) days from receipt of the Order Confirming the Prehearing Telephonic Conference to file his written response with regard to mitigation of the civil money penalty. Counsel was also directed to include a written waiver of Respondent's request for hearing.

I informed the parties that I had no jurisdiction to grant Respondent's request that my final order not affect Respondent's ability to legally emigrate, reside or enter the United States at a future date. See 8 U.S.C. § 1324c; 28 C.F.R. § 68.28.

Since counsel admitted liability in this matter on behalf of his client, I granted the Complainant's Motion for Summary Decision on liability only. To date Respondent has not filed a written statement on equities.

III. Discussion

Upon proof of a Respondent's first violation of the document fraud provisions of the Act, the administrative law judge issues a cease and desist order from future violations and awards Complainant civil money penalties of not less than \$250 and not more than \$2,000 for each document used, accepted or created and each instance of use, acceptance or creation. 8 U.S.C. § 1324c(d)(3). The statute and regulations do not provide guidance in determining how the specific amount of civil money penalties are to be determined. See 8 U.S.C. § 1324c.

A. Complainant's Position

In its Motion for Summary Decision, Complainant explained the criteria it uses in setting the civil money penalty amount requested for document fraud violations. In support, Complainant filed Agent Jensen's Rationale for Recommended Notice of Intent to Fine.

In general, Complainant considers the following factors:

1. Respondent's age, i.e., youthful or elderly;
2. The seriousness of the violation;
3. Respondent's history of previous criminal/civil violations;

4. Respondent's immigration status;
5. Respondent's purpose for the document fraud, i.e., employment, monetary gain, rejoining immediate relatives, etc.;
6. Other aggravating factors.

In this case, Complainant asserted that the Chief Border Patrol Agent considered each of the above factors as well as the case agent's recommendation in setting the amount of civil money penalties.

1. Respondent's Age

Complainant asserted that Respondent was a 34 year old male, native and citizen of Guatemala at the time of the violations.

2. The Seriousness of the Violation

Complainant argued that Respondent's use of the fraudulent documents frustrated the purpose of the employment eligibility verification system, i.e., to deter and eliminate employment of illegal aliens in the United States, and, thus, is serious.

3. Respondent's History of Previous Criminal/Civil Violations

Complainant asserted that Respondent was arrested in Santa Barbara County on September 30, 1992 for forgery and driving without a license. The forgery charge prosecution was dropped because the statute of limitations had run. There were no prior immigration or criminal records found for Respondent.

4. Respondent's Immigration Status

Complainant asserted that Respondent's last entry into the United States was as a B-2 visitor on September 13, 1992.

5. Respondent's Purpose for the Document Fraud

Complainant asserts that, in a sworn statement to Agent Jensen, Respondent stated that he bought the counterfeit documents in May, 1992 in Los Angeles and used them for employment purposes.

6. Other Aggravating Factors

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It is unclear exactly what other aggravating factors Complainant considered; however, it asserts that Respondent refused to sign his sworn statement.

Complainant also asserts that its request for a \$500 civil money penalty for each of these serious violations is a reasonable and reasoned amount which should not be disturbed.

B. Respondent's Position

Respondent has admitted liability but has not filed the statement regarding his equities as represented. However, I note that Respondent asserted in previous documents that he is without significant funds, has left the United States in an effort to mitigate his consequences, does not intend to return to the United States unless he can do so legally, and had applied for political asylum prior to his departure.

Respondent has requested a civil money penalty of not more than \$250 and an Order which will not affect his ability to legally enter, emigrate or reside in the United States in the future.

C. Analysis

1. Respondent's Liability

The standard for granting a motion for summary decision is whether there is a genuine issue of material fact. Based on the undisputed evidence of record and Respondent's admission of liability, I have already held that there is no genuine issue of material fact and granted Complainant's motion as to liability.

2. Complainant's Motion for Abandonment

I find Complainant's Motion for Abandonment to be without merit as no hearing took place. The motion is denied.

3. Civil Money Penalties

I now need to consider the appropriate amount of civil money penalties to award for these violations. Under 8 U.S.C. § 1324c, I am authorized to issue a final decision and order that includes a cease and desist order and an award of civil money penalties.

I am also aware that, although not contained in 8 U.S.C. § 1324c, there are other, very serious consequences to my final order finding that Respondent has violated the document fraud provisions of the Act. A final order finding that Respondent violated 8 U.S.C. § 1324c renders Respondent deportable and permanently excludable from the United States. 8 U.S.C. §§ 1251(a)(1)(A), (a)(21), 1182(a)(6)(F); §§ 241(a)(1)(A), 241(a)(21), § 212(a)(6)(F) of the Immigration and Nationality Act.¹ Respondent alluded to these consequences in his request that my Order be drafted in such a manner that it would not affect Respondent's future ability to emigrate or enter the U.S. However, Congress was aware of the effect of a final order finding 8 U.S.C. § 1324c violations and did not give the administrative law judge the authority to minimize, mitigate or eliminate these dire consequences. My only discretion here is in setting the amount of civil money penalties. See 8 U.S.C. § 1324c(d); 28 C.F.R. § 68.52(c)(3).

In considering how to set a standard for determining the civil money penalties in a document fraud case, I reviewed the standard that I use when setting civil money penalties in 8 U.S.C. § 1324a(a)(1)(A) violations. In those cases, as in document fraud violations, neither the statute or regulations provide guidance. There, I have held that I would use a judgmental approach and consider the relevant factors set forth in 8 U.S.C. § 1324a(e)(5) and any other relevant information.

In determining the appropriate amount of civil money penalties in a document fraud case under 8 U.S.C. § 1324c, I have decided that I will use a judgmental approach under a reasonableness standard and consider the factors set forth by Complainant, any relevant mitigating factors provided by Respondent, and any other relevant information of record.

In this case, I have considered both parties' arguments, the filed affidavits, and other information of record including Respondent's claim that he is a widower since April, 1992 with two children who have been

¹ Section 544 (b) of the Immigration and Nationality Act of 1990 added a new ground for deportation, the fact that an alien is subject to a final order for violating INA 274C. However, this ground was not listed in Section 602, which totally revised the grounds of deportation, but was listed in Section 601, which revised the grounds of excludability. Although the new document fraud ground for deportation was added as subparagraph (C) to INA 241(a)(3) by Section 307(h)(8) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102-232, it still appears as subsection (21) of INA 241.

staying for an unspecified time with his mother in Los Angeles and that he entered legally on a B-2 visa.

I agree with Complainant that this is a serious offense which interferes with Congress' scheme to deter illegal immigration. I find that Respondent knowingly engaged in illegal activity when he purchased and/or obtained counterfeit documents in May 1992 and that he knowingly engaged in illegal activity by using fraudulent documents for the purpose of obtaining employment. I find that Respondent has no record of criminal convictions or of other civil or immigration related violations. As it has not been opposed, I find that Respondent has limited funds available to him.

After serious and tempered consideration, I find that the civil money penalties requested by Complainant are reasonable and well within the statute's parameters. Therefore, based on the standard that I have set for determining the appropriate civil money penalties for document fraud violations, I find that it is reasonable and appropriate that Respondent pay \$500 per violation for a total civil money penalty of \$1,000. Further, I order Respondent to cease and desist from any further activities prohibited by 8 U.S.C. § 1324c(a).

IV. Findings Of Fact And Conclusions Of Law

Based on all the evidence of record, as well as the relevant law and my analysis above, I make the following findings of fact and conclusions of law:

1. Mr. Oscar Eduardo Villatoro-Guzman, a citizen and national of Guatemala, is the Respondent in this case;
2. Mr. Guzman entered the United States with a valid B-2 visa;
3. Mr. Guzman knowingly obtained and used counterfeit documents, i.e., an Alien Registration Card (Form I-551), No. A097747276, and a Social Security Card, No. 626-50-8325, in May 1992 for the purpose of obtaining employment in the United States;
4. Mr. Guzman was properly served by Complainant with a Notice of Intent to Fine on October 7, 1992 alleging two violations of 8 U.S.C. § 1324c;

5. The NIF properly informed Respondent of his rights under 8 U.S.C. § 1324c including the right to a hearing before an administrative law judge;
6. On November 30, 1992, Respondent, through counsel, timely requested a hearing;
7. Respondent was properly served with a Complaint incorporating the NIF on March 2, 1993 and filed a timely Answer with Affirmative Defenses on April 1, 1993;
8. Respondent's Affirmative Defenses were stricken by Order on July 22, 1993;
9. On January 18, 1994, through Counsel, Respondent admitted liability, waived his hearing and agreed to submit written argument regarding the determination of appropriate civil money penalties including his equities;
10. Respondent did not file such statement;
11. Respondent has knowingly violated 8 U.S.C. § 1324c(a)(2) in that he purchased and/or obtained two counterfeit documents for the purpose of obtaining employment;
12. Complainant's Motion for Summary Decision was GRANTED as to liability only on January 18, 1994;
13. Complainant's requested civil money penalties are reasonable and well within the parameters of the statute;
14. Respondent has no record of criminal convictions or of other civil or immigration related violations;
15. Respondent has limited funds available to him.
16. Respondent is ordered to cease and desist from further violations of 8 U.S.C. § 1324c(a);
17. The civil money penalties requested by Complainant are reasonable and well within the statute's parameters;
18. Respondent is ordered to pay Complainant \$500 in civil money penalties for each violation for a total of \$1,000;

19. Complainant's Motion for Abandonment is DENIED; and

20. All of the motions not ruled on are hereby DENIED.

V. Appeal Procedure

The Chief Administrative Hearing Officer (CAHO) has the discretionary authority, pursuant to §§ 274A(e)(7) and 274C(d)(4) of the Immigration and Nationality Act and 5 U.S.C. § 557(b), to review the Administrative Law Judge's (ALJ) decision and order. 28 C.F.R. § 68.53(a). A party may file with the CAHO a written request for review together with supporting documents. Within thirty (30) days of the date of the ALJ's decision and order, the CAHO may issue an order which modifies or vacates the ALJ's decision and order. However the CAHO is not obligated to issue an order unless the ALJ's order is modified or vacated. 28 C.F.R. § 68.53(a)(1).

If the CAHO issues an order which modifies or vacates the ALJ's decision and order, the CAHO's decision and order becomes the final agency decision and order of the Attorney General on the date of the CAHO's decision and order. If the CAHO does not modify, or vacate, the ALJ's decision and order becomes the final agency order of the Attorney General, thirty (30) days after the date of the ALJ's decision and order. 28 C.F.R. § 68.53(a)(2).

A person or entity adversely affected by a final agency decision and order of the Attorney General respecting an assessment may file, within forty-five (45) days after the date of the Attorney General's final agency decision and order, a petition in the Court of Appeals for the appropriate circuit for review of the Attorney General's final decision and order. Failure to request review by the CAHO of a decision by the ALJ shall not prevent a party from seeking judicial review. 28 C.F.R. § 68.53(a)(3).

SO ORDERED this 22nd day of June, 1994, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge